NO. 85382-7

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 40909-7-II)
(Clark County Superior Court Cause No. 09-2-02453-1)

DOUGLAS FELLOWS as Personal Representative
of the Estate of JORDAN GALLINAT

Petitioner,

vs.

DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHINSON, M.D.
AND SOUTHWEST WASHINGTON MEDICAL CENTER,

Respondents.

PETITIONER'S REPLY MEMORANDUM ON MOTION FOR DISCRETIONARY REVIEW

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A. Introduction

Petitioner Doug Fellows respectfully offers this reply memorandum in support of his motion for discretionary review.

B. Argument

1. The Court of Appeals Committed Obvious or Probable Error in Ruling that the Hospital's Credentialing and Privileging Records Were Privileged from Discovery.

RAP 13.5(b) provides:

> **(b) Considerations Governing Acceptance of Review.** Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:
>
> (1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or
>
> (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act...,[1]

This appeal involves the scope of the quality review privilege in RCW 4.24.250 and RCW 70.41.200(3) as it relates to Southwest Washington Medical Center's (the hospital's) credentialing and privileging records for

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[1]Under RAP 13.3(d), this motion, which was incorrectly designated as a petition for review, "will be given the same effect as a motion for discretionary review." In his motion for discretionary review in the Court of Appeals, petitioner addressed the criteria in RAP 2.3(b)(1) and (2), which are essentially the same as the criteria in RAP 13.5(b)(1) and (2) so respondents are not surprised or prejudiced by having these criteria addressed in this reply memorandum.

petitioner's treating physicians to perform vacuum extraction deliveries and neonatal resuscitation. The Court of Appeals ruled that all of the hospital's credentialing and privileging records are privileged under RCW 70.41.200(3). App. 126; Second Supp. App. 217. That ruling was obvious or probable error under the evidentiary standards, burden of proof and statutory purposes identified in *Coburn v. Seda*, 101 Wn.2d 270, 677 P.2d 173 (1984), *Anderson v. Breda*, 103 Wn.2d 901, 700 P.2d 737 (1985) and *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 864 P.2d 921 (1991).

Under *Coburn* and *Anderson*, a hospital's credentialing and privileging records are not privileged under RCW 4.24.250 because they are "files of the hospital administration", 103 Wn.2d at 906, involving "information generated outside review committee meetings", 101 Wn.2d at 277, not "retrospective review" of medical services, 101 Wn.2d at 278; 103 Wn.2d at 906, and are outside the statutory purpose of "keep[ing] peer review studies, discussions, and deliberations confidential." 103 Wn.2d at 907. In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497, 933 P.2d 1036 (1997), a case where the defendant hospital did not assert that its credentialing and privileging records were privileged, this Court ruled "it was an abuse of

discretion for the trial court to impose the severe sanction of limiting discovery ... on the credentialing issue."

In this case, the Court of Appeals correctly ruled that RCW 4.24.250 "creates a similar privilege" to RCW 70.41.200(3), and that "the evidentiary standard set forth in *Coburn, Anderson* and *Adcox*" applies to RCW 70.41.200(3). Supp. App. 124-126. But the Court of Appeals committed obvious or probable error in ruling that the Eling declaration "seems to have met the evidentiary standard set forth in *Coburn, Anderson* and *Adcox.*" App. 126.[2] The hospital's credentialing and privileging records involve "original source information" that was generated in the medical schools and previous medical practices of petitioner's treating physicians outside of hospital review committee meetings. *Coburn* holds that such records are not privileged and that hospitals may not obstruct their discovery by assigning their quality review committees to collect and maintain them:

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[2]The Eling declaration states:

> "Defendant SWMC had a regularly constituted quality improvement/peer review committee at least as far back as 1993 or 1994.... The regularly constituted hospital quality improvement committee, of which the credentials committee was a part, maintained the hospital's credentials files for the physicians and were created specifically for and collected and maintained by the peer review committee." App. 153.

> The statute may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings. The statute does not grant an immunity to information otherwise available from original sources. For example, any information from original sources would not be shielded merely by its introduction at a review committee meeting.

101 Wn.2d at 277.

Under RCW 70.43.010 (1986), hospitals must "set standards and procedures... in considering and acting upon applications for staff membership or professional privileges." Thus, hospital administration files must contain credentialing and privileging records. *Anderson* holds that the quality review privilege "does not embrace the files of the hospital administration." 103 Wn.2d at 906. Under *Coburn* and *Anderson*, neither the Eling declaration nor the hospital's apparent merger of its credentialing committee into its peer review committee can convert the hospital's non-privileged, original source, credentialing and privileging records into privileged "quality improvement program" records. Under *Coburn*, this original source information is discoverable regardless of what hospital committee collected or maintained them. Thus, even if the hospital's privileging and personnel records for petitioner's physicians "were created specifically for and collected and maintained by the peer review committee" as the Eling declaration claims, they are not privileged because they are

"administrative records ... [in] the files of the hospital administration" which "are discoverable to the extent they do not contain the record of immune proceedings." *Anderson*, 103 Wn.2d at 906.

Respondents' suggestion that the privilege limitations in *Coburn*, *Anderson* and *Adcox* only apply to RCW 4.24.250, not to RCW 70.41.200(3), is incorrect.[3] In 1971, the legislature enacted RCW 4.24.250 whose privilege limitations were discussed in *Coburn* in 1984 and in *Anderson* in 1985. RCW 70.41.200(3) was enacted in 1986. "The legislature is presumed to be familiar with its own prior enactments and also with judicial decisions on the subject." *Daly v. Chapman*, 85 Wn.2d 780, 782, 539 P.2d 831 (1975). Thus, the legislature was familiar with *Coburn 's* and *Anderson 's* limitations on the quality review privilege when it enacted RCW 70.41.200(3). There is no indication in the text or legislative history of RCW 70.41.200(3) that the legislature intended to overrule *Coburn* and *Anderson* and make a hospital's credentialing, privileging and personnel records privileged.

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[3]For example, respondents argue that "rulings based on the privilege conferred by RCW 70.41.200(3) could not possibly conflict with *Coburn* because *Coburn* was decided before that statute was enacted in 1986." *Moynihan 's Answer* at 11. But the issue is not when *Coburn* was decided, but rather that the privilege limitations that *Coburn, Anderson* and *Adcox* applied to RCW 4.24.250 also apply to RCW 70.41.200(3), as the Court of Appeals ruled.

RCW 4.24.250 and RCW 70.41.200 both contemplate "retrospective review" of patient care by review committees. RCW 4.24.250 governs proceedings "before a regularly constituted committee or board of a hospital whose duty it is to *review* and evaluate... the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital...." RCW 70.41.200(1) requires hospitals to establish (a) "a quality improvement committee with the responsibility to *review the services rendered* in the hospital, both retrospectively and prospectively", (b) "[a] medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically *reviewed* as part of an evaluation of staff privileges"; and (c) to conduct "periodic *review* of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital...." (Emphasis supplied)

RCW 4.24.250 creates a privilege against discovery of "[t]he proceedings, reports, and written records of such regularly constituted *review* committees or boards." RCW 70.41.200(3) creates a privilege against discovery of "information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality

improvement committee...."[4] Neither statute by its terms purports to protect hospital credentialing and privileging records, which involve a physician's prospective qualifications, competence and authorization to render medical treatment, not a retrospective review of a physician's medical services.

Respondent Moynihan's contention that RCW 70.41.200(3) eliminated *Coburn's* and *Anderson's* distinction between retrospective and prospective review, *Moynihan's Answer* at 11, is not supported by the text of the statute. The text Moynihan relies on, RCW 70.41.200(1)(b), charges "a quality improvement committee with the responsibility to *review the services rendered* in the hospital, both retrospectively and prospectively." This statutory language reflects a legislative purpose to review past medical services with a goal of improving future medical services. It does not say or imply that hospital records of a physician's credentials and privileges to render prospective medical care, which have nothing to do with committee review of past "medical services rendered in the hospital", are privileged under RCW 70.41.200(3).

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[4]The hospital has disclosed that Dr. Moynihan's staff privileges were restricted and identified the specific restrictions imposed–*i.e.* restriction of his in-hospital vaginal operative delivery privileges and postpartum care privileges–but has not explained "the reasons for the restrictions" as required by RCW 70.41.200(3)(d).

Under *Adcox*, 123 Wn.2d at 31, respondents have the burden to prove that RCW 70.41.200(3), strictly construed in favor of discovery, eliminated *Coburn's* and *Anderson's* distinction between privileged "retrospective review" records and non-privileged hospital "administrative records":

> We have already recognized that this statute [RCW 4.24.250], being contrary to the general policy favoring discovery, is to be strictly construed and limited to its purposes. *Coburn v. Seda*, 101 Wash.2d 270, 276, 677 P.2d 173 (1984); *Anderson v. Breda*, 103 Wash.2d 901, 905, 700 P.2d 737 (1985). Moreover, the burden of proving the statute's applicability rests with the party seeking its application. *Anderson*, 103 Wash.2d at 905, 700 P.2d 737.

Respondents have not offered any evidence to meet this burden. They have not demonstrated that the legislature in enacting RCW 70.41.200(3) intended to overrule *Coburn* and *Anderson* or that the Court of Appeals erred in ruling that *Coburn*, *Anderson* and *Adcox* apply to RCW 70.41.200(3). Original source credentialing and privileging records remain non-privileged under RCW 70.41.200(3). Indeed, *Moynihan's Answer* at 11 admits it is *"difficult to respond to"* petitioner's argument that the hospital's credentialing, privileging and personnel records are non-privileged "administrative records [since they] do not contain the record of immune proceedings and do not interfere with the statute's purpose" of "keep[ing] peer review studies, discussions, and deliberations confidential." 103 Wn.2d at 907.

2. The Court of Appeals Decision Substantially Alters the Status Quo, Substantially Limits Petitioner's Freedom to Act, and Will Render Further Proceedings Useless.

The status quo under *Coburn, Anderson* and *Adcox* is that a hospital's credentialing and privileging records are non-privileged because they are administrative records, not records of retrospective review of patient treatment. The status quo under *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984), *Douglas v. Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991), and *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009) is that a hospital's credentialing and privileging records are relevant and necessary to prove a corporate negligent credentialing claim against a hospital. The status quo under *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009) is that a party has a constitutional right to discover non-privileged evidence that is necessary to prove his claim. The status quo under *Burnet v. Spokane Ambulance* is that it is an abuse of discretion to prevent discovery of a hospital's credentialing and privileging records. Denying access to non-privileged credentialing and privileging evidence substantially alters the status quo and limits petitioner's freedom to act by preventing him from proving his corporate negligence claim and by depriving him of evidence that is relevant to his medical malpractice claims.

The Court of Appeals decision will render further proceedings useless on petitioner's corporate negligence claim by preventing that claim from being proven. Under *Putman*, petitioner has a legal right to obtain non-privileged evidence to support each of his claims. No law supports the hospital's contention, *SWMC's Answer* at 5-6, that RAP 13.5(b)(1)'s "obvious error which would render further proceedings useless" standard should only apply in single-claim or single-defendant lawsuits. Denying petitioner the evidence necessary to meet his burden of proof will render further proceedings useless on his corporate negligence claim.

C. Conclusion

Petitioner respectfully asks the Supreme Court to grant discretionary review, reverse the Court of Appeals, and remand with directions to order production of the hospital's credentialing, privileging and personnel records for Jordan Gallinat's treating physicians.

RESPECTFULLY OFFERED this 25th day of January 2011.

LAW OFFICES OF JOHN BUDLONG

By _____
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Attorneys for Petitioner Fellows/Gallinat

NO. 85382-7

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I hereby certify under penalty of perjury under the laws of the State of Washington that on this date an original and/or copy of Petitioner's Reply Memorandum on Motion for Discretionary Review were sent via e-mail and/or by legal messenger/first class mail for filing with the court identified below and delivered to the following attorneys for Respondents:

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DATED this 25th day of January, 2011.

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Dear Sir or Madam:

We have attached the following documents for filing -

1. Petitioner's Reply Memorandum on Motion for Discretionary Review; and,
2. Certificate of Service

Thank you.

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